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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al., Petitioners, v. UTAH DIV. OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondents/Intervenors.	**BRIEF OF UTAH CHAPTER OF SIERRA CLUB, ET AL., ON (1) THE MEANING OF RULE B-15's OBJECTIVE BAD-FAITH ELEMENT; AND (2) APPLICATION OF RULE B-15 IF THE BOARD FINDS THAT PETITIONERS HAD AT LEAST SOME OBJECTIVE GOOD-FAITH BASIS FOR CHALLENGING THE PERMIT** Docket No. 2009-019 Cause No. C/025/005

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INTRODUCTION

To recover attorney fees under Rule B-15, Alton Coal Development, LLC (Alton) must prove that Petitioners Utah Chapter of the Sierra Club, et al. (Petitioners) challenged the Coal Hollow mine permit in both *objective* and *subjective* bad faith.[1] This brief addresses the objective component of Rule B-15's standard, and how the Board should proceed if it determines that there was at least some objective good-faith basis for Petitioners to challenge the permit. (Petitioners contend that they litigated the underlying permit challenge entirely in objective and subjective good faith, but recognize that the Board has not requested briefing on that at this time.)

Rule B-15 has not yet been interpreted by the Board or any court. However, there is abundant, consistent, and persuasive authority in related contexts that supports reading Rule B-15's objective bad-faith prong to require a permittee who seeks to recover its attorney fees against a person who challenged a permit to prove that the permit challenge was entirely without color and objectively frivolous. An objective-frivolousness standard is used in Utah's civil bad-faith attorney-fee statute, in Utah Rule of Civil Procedure 11, and in precedent relating to relevant and analogous federal

[1] An "objective" inquiry turns on "externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." *Black's Law Dictionary* 1241 (10th ed. 2014). For example, an objective test might ask what a reasonable person should have known, or how a reasonable person would have acted—not what a specific person believed, or how a specific person actually acted. *See, e.g., Baird v. Baird*, 322 P.3d 728, 734-35 (Utah 2014). "Subjective" evaluations, by contrast, turn on a particular individual's personal perceptions or intentions. *Black's Law Dictionary* 1652 (10th ed. 2014).

attorney-fee provisions. Interpreting Rule B-15's objective bad-faith standard to require proof of frivolousness would likewise further Rule B-15's and the Utah Coal Mining and Reclamation Act's purposes of encouraging public participation.

Rule B-15 does not permit attorney fees to be awarded to a permittee against a person who had any objective good-faith (that is, a non-frivolous) basis to challenge a permit. Instead, Rule B-15 allows attorney fees to be awarded to a permittee only where the person from whom fees are sought initiated the *proceeding*, or participated in it, in bad faith. This is in contrast to some other attorney-fee provisions, like Utah Rule of Civil Procedure 11, which allow attorney fees to be awarded as to any frivolous *motion* or *contention*.

The Utah Court of Appeals has interpreted a statute that, analogous to Rule B-15, allows attorney fees to be awarded only when an "action" (similar to a "proceeding") was both meritless and brought in subjective bad faith. *Dahl v. Harrison*, 265 P.3d 139, 149-50 (Utah App. 2011). As *Dahl* held, the plain meaning of the word *action* precludes a court from awarding fees simply because a motion filed during the action was frivolous and in bad faith. Similarly, under Rule B-15, a person does not initiate or participate in a permit-challenge *proceeding* in objective bad faith if the person had any non-frivolous basis for the challenge, even if some motion or claim were thought frivolous.

Because Rule B-15 does not require a person who had some objective good-faith basis for challenging a permit to pay the permittee's attorney fees, Alton's fee petition

must be denied unless Alton could somehow persuade the Board that Petitioners had *no* objective good-faith basis for their permit challenge. Absent such a finding, Alton's fee petition should be denied under Rule B-15 even if Alton were able to persuade the Board that Petitioners raised some contention that was objectively frivolous.

This Board should therefore proceed by requiring the parties to brief whether Petitioners had any non-frivolous basis for bringing the underlying permit challenge. If the Board finds that Petitioners initiated the proceeding in good faith because they had a non-frivolous basis to challenge the permit, then the Board should deny Alton's fee petition and bring this protracted, satellite litigation to an end.

PROCEDURAL HISTORY

In 2009, Petitioners filed a Request for Agency Action seeking Board review of the Division's approval of Alton's application to conduct surface coal mining in Coal Hollow, near Bryce Canyon National Park. Petitioners asserted that the Division's approval of the Permit violated several legal requirements, and that the approval should be either vacated and denied or corrected. *See* Req. for Agency Action and Req. for Hear'g by Pet'rs Utah Chapter of the Sierra Club *et al.* (Nov. 18, 2009). Alton chose to intervene, to join the Division in defending against the permit challenge.

On January 13, 2010, the Board issued an order regarding the scope and standard of review for the underlying request for agency action. *See* Findings of Fact, Conclusions of Law, and Final Order 5, ¶ 28 (Oct. 6, 2010). On February 18, 2010, the Board denied

Alton's and the Division's partial motions to dismiss. *Id.* at 6, ¶ 29-30. A multi-day evidentiary hearing followed. *Id.* at 7, ¶ 43. At the conclusion of this process, the Board affirmed the Permit. *Id.* at 48, ¶ 291. One member of the Board dissented in part, and would have ruled for Petitioners on that issue. *See* Interim Order Concerning Disposition of Claims 22 (Aug. 3, 2010) (minority opinion). On appeal, the Utah Supreme Court affirmed the Board's decision, bringing Petitioners' challenge to a close.[2] *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 289 P.3d 558 (Utah 2012).

At no time during the extensive merits proceedings did the Board, the Division, the Utah Supreme Court, or even Alton allege that Petitioners' challenge to Alton's permit was brought in objective or subjective bad faith. After the merits were finally resolved, however, Alton announced an intention to try to force Petitioners to pay its attorney fees.

Originally, Alton claimed a right to charge its attorney fees to Petitioners on the theory that Alton, which had chosen to intervene, had been "substantial[ly] involve[d]" in the proceedings and had prevailed. *See* Alton Coal Development, LLC's Opening Br. on the Legal Standard Governing Fee Pets. 4-5 (Jan. 10, 2013). Later, Alton claimed

[2] In 2010, after the Division took action to correct an error that Petitioners identified during the proceeding, Petitioners petitioned for costs and attorney fees against the Division. *See* Pet. for Award of Costs and Expenses Including Reasonable Att'y Fees (December 21, 2010). The Board initially stayed action on that petition. *See* Order Granting Mots. to Postpone Further Consideration of Pet. for Award of Costs and Att'y Fees Pending Resolution of Appeal (Mar. 7, 2011). Petitioners withdrew their cost and fee petition in 2014. *See* Notice Regarding Pet'rs' Dec. 21, 2010 Pet. for Costs and Expenses (May 27, 2014).

entitlement to fees on the theory that Petitioners had "failed to . . . participate effectively in the hearing." *See* Alton Reply Br. on the Legal Standard Governing Fee Pets. 13 (Feb. 18, 2013). Alton then further revised its position to allege an entitlement to fees because, it claimed, some of Petitioners' litigation positions had allegedly been "unreasonable," "groundless," or "frivolous." *See* Feb. 27, 2013 Hear'g Tr. at 8-9. In March 2013, however, the Board ruled that Alton must satisfy Rule B-15 to recover attorney fees from Petitioners.[3] *See* Decision and Order on the Legal Standard Governing Fee Pets. 3-4 (Mar. 27, 2013).

Rule B-15 states that the Board may award attorney fees to a permittee that demonstrates that an opposing party "initiated a proceeding . . . or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee." Rule B-15, *quoted in* Decision & Order on the Legal Standard Governing Fee Pets. 4 (Mar. 27, 2013). The Board has subsequently decided that Rule B-15's bad-faith standard "includes both an objective as well as subjective element." Suppl. Order Concerning Renewed Mot. for Leave to Conduct Disc. 2 (Nov. 3, 2014).

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[3] Subject to certain exceptions, Utah follows the general "American rule" that "attorney fees are not recoverable by a prevailing party unless authorized by statute or contract." *Faust v. KAI Techs., Inc.*, 15 P.3d 1266, 1269 (Utah 2000).

DISCUSSION

I. To show objective bad faith under Rule B-15, a permittee must prove the opposing party's permit challenge was objectively frivolous

While the Board has held that Rule B-15's bad-faith standard "includes both an objective as well as subjective element," it has not opined on what a permittee must prove to demonstrate objective bad faith. *See* Suppl. Order Concerning Renewed Mot. for Leave to Conduct Disc. 2, 5 n.1 (Nov. 3, 2014). Indeed, to our knowledge, the Board has never awarded attorney fees under Rule B-15 to any party.

There is, however, ample precedent from related contexts—including Utah's civil bad faith attorney-fee statute, Utah Rule of Civil Procedure 11, and federal attorney fee law—that indicates that an objective bad-faith standard requires clear proof of objective frivolousness. An objective frivolousness standard is also consistent with both the history and purpose of Rule B-15 and Utah's Coal Mining and Reclamation Act.

A. Utah cases interpreting the state's civil attorney-fee statute suggest that Rule B-15's objective bad-faith prong requires a showing of objective frivolousness

Although Rule B-15 has itself never been interpreted by this Board or any court, Utah courts have interpreted other state laws that authorize attorney-fee awards against a litigant that has violated both objective and subjective standards. Section 78B-5-825 of the Utah Code, which applies in civil litigation, allows attorney fees to be awarded "to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Utah Code Ann. § 78B-5-

825(1).[4] This statute is analogous to Rule B-15 insofar as it requires both an objective showing ("without merit") and a subjective showing (lack of "good faith"). *See Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983). Alton has said that the statute is "akin to" to Rule B-15, and the Division has suggested that the Board look to interpretations of section 78B-5-825 when interpreting Rule B-15. *See* Alton's Reply Mem. in Supp. of Mot. for Disc. 5 (Dec. 20, 2013); Division's Mem. in Resp. to Pet'rs' Mot. to Dismiss 5 (May 2, 2014). Petitioners agree that litigation conduct that would not violate section 78B-5-825's "without merit" standard does not evince objective bad faith under Rule B-15.

The Utah Supreme Court has held that a claim is "without merit" under section 78B-5-825 if it borders on the frivolous. *Cady*, 671 P.2d at 151; *accord Wardley Better Homes & Gardens v. Cannon*, 61 P.3d 1009, 1018 (Utah 2002). Thus, "[t]o demonstrate that an action is 'without merit,' the party seeking an award of attorney fees must do more than assert that the case was unsuccessful." *Verdi Energy Grp., Inc. v. Nelson*, 326 P.3d 104, 115 (Utah Ct. App. 2014). Instead, an action is "without merit" under section 78B-5-825 only where the claims were "so deficient that [the party] could not have reasonably believed them to have a basis in law or in fact." *Id.*

The decisions in which Utah courts have found a litigant's case to be "without merit" under section 78B-5-825 are generally remarkable for their extreme facts. "For example, Utah appellate courts have held that for purposes of the bad faith statute, an

[4] Section 78B-5-825 was previously codified at Utah Code Ann. § 78-27-56, and some judicial precedent refers to the statute by that earlier section number.

action or defense is without merit when a party *misrepresented* the underlying facts in order to try to make out its claim or defense, and when the plaintiff *fraudulently altered* the documents underlying the claim." *Verdi Energy Grp.*, 326 P.3d at 115 (emphases added) (citations omitted). By contrast, Utah courts have not found an action to be "without merit" under section 78B-5-825 merely because a litigant brought and lost a weak claim. *See, e.g., Martin v. Rasmussen*, 334 P.3d 507, 513 (Utah Ct. App. 2014) (reversing award of attorney fee to prevailing litigant where losing party had pointed to some state and federal cases to support its position).

Rule B-15's objective bad-faith prong requires at least as strong a showing as section 78B-5-825's without-merit requirement. Where a person initiates a non-frivolous proceeding to challenge a surface coal-mine permit, that challenge is not in objective bad faith, so attorney fees may not be awarded.

B. The objective standard applied under Utah Rule of Civil Procedure 11 suggests that Rule B-15's objective bad-faith prong requires a showing of objective frivolousness

Utah Rule of Civil Procedure 11 allows Utah district courts to sanction litigation misconduct applying an objective unreasonableness standard that parallels Rule B-15's objective bad-faith standard. In light of the absence of any case law on Rule B-15 itself, the Division has suggested that the Board "be guided" by Rule 11 jurisprudence when interpreting Rule B-15's objective bad-faith prong. Division's Mem. in Resp. to Pet'rs' Mot. to Dismiss 5 (May 2, 2014). Petitioners agree that conduct that would not violate

Rule 11's standards of objective unreasonableness would equally not constitute objective bad faith under Rule B-15.

Rule 11 requires that every pleading, motion, and paper that is filed be signed by the attorney or party to certify that, among other things, its legal contentions are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and its factual contentions either have "evidentiary support" or "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Utah R. Civ. P. 11(b). Under these parts of Rule 11, "[s]ubjective intentions are essentially irrelevant," as "the determination of whether the rule has been violated is made on an objective basis." *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah Ct. App. 1989).

Notably, Rule 11 does not allow a party to be sanctioned merely because it brought a novel claim, misunderstood the law, or lost its case. Rule 11's objective standard does not "require the attorney to reach the correct legal position from [his legal] research," *Barnard v. Sutliff*, 846 P.2d 1229, 1236 (Utah 1992), and allows an attorney to advance "inventive" arguments that rely on "cases in other jurisdictions that supported its position." *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 171 P.3d 465, 468 (Utah Ct. App. 2007). Sanctions are also not appropriate just because "certain facts

revealed during discovery weakened [a party's] position."[5] *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785 (2d Cir. 1988). "[T]he operative question is whether the argument is frivolous, i.e., the legal position has no chance of success, and there is no reasonable argument to extend, modify or reverse the law as it stands." *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 177 (2d Cir. 2012) (internal quotation marks omitted) (citation omitted). If a party's attorneys "neither ignore[] nor misrepresent[]" facts uncovered during discovery, and the attorneys "acknowledge[] the facts and argue[] [their] position as zealously as possible," sanctions are not warranted. *Motown Prods.*, 849 F.2d at 785.

As with precedent under section 78B-5-825, the cases that have imposed attorney fee sanctions under Rule 11 are generally notable for the extent and degree of malfeasance involved. For example, the Utah Court of Appeals upheld the imposition of Rule 11 sanctions against a plaintiff who "repeatedly attempted to relitigate" the same issue, and to do so "without any evidentiary support," even *after* the plaintiff's "prior lawsuits on the [same issue] were dismissed with prejudice." *Bowers v. Call*, 257 P.3d 433, 434 (Utah Ct. App. 2011). Similarly, the Court of Appeals upheld imposition of Rule 11 sanctions against a person who made "false and unsupported" factual assertions that were directly disproven by the litigation record in that very case; for

[5] Cases interpreting the parallel Federal Rule of Civil Procedure 11 are persuasive because Utah's Rule 11 is nearly identical to the text of the parallel federal rule, and the Utah Supreme Court has held that "Utah's rule 11 is patterned after the federal rule 11." *Barnard v. Sutliff*, 846 P.2d at 1236; *see also Morse v. Packer*, 15 P.3d 1021, 1028 (Utah 2000).

instance, the person had made a false claim that the judge had evicted him from his home without allowing him to participate in hearings or to conduct discovery, when the litigation record plainly showed that the person had participated in hearings and had conducted discovery. *Golden Meadows Props., LC v. Strand*, 249 P.3d 596, 599, 601 (Utah Ct. App. 2011).

Litigation that is not frivolous does not violate Rule 11, and should not be held to evince objective bad faith under Rule B-15.

C. Federal judicial interpretations of similarly worded attorney-fee statutes indicate that Rule B-15's objective bad-faith prong requires a showing of objective frivolousness

The holdings of federal cases that have interpreted attorney-fee statutes with wording similar to Rule B-15 support a finding that Rule B-15's objective prong requires a demonstration of frivolousness.

Section 813 of the Fair Debt Collection Practices Act, for example, allows a court to award attorney fees to a defendant "[o]n a finding . . . that an action under this section was brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). In *Marx v. General Revenue Corp.*, 133 S. Ct. 1166 (2013), the U.S. Supreme Court explained that this section codifies a common-law exception to the general "American rule" that each party must pay its own attorney fees, and reflects that courts have "inherent power to award attorney's fees . . . when a party brings an action in bad faith." *Id.* at 1175-76.

Under the common-law bad-faith exception referenced in *Marx*, courts apply a "two-prong test" with both objective and subjective components: "[a] party acts in bad faith only when the claim brought is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *FTC v. Freecom Comm'c'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005) (internal quotation marks omitted) (emphasis omitted). "The question is whether a . . . reasonable plaintiff . . . could have concluded that facts supporting the claim might be established, not whether such facts actually had been established." *Id.* (internal quotation marks omitted) (citation omitted). Thus, a merely "weak or legally inadequate claim will not support a fee award" under this objective bad-faith standard. *Id.* (internal quotation marks omitted). Moreover, the bad-faith exception is "narrow," applying only in "exceptional cases" where there is "clear evidence" that the action was both "frivolous" and pursued for reasons of harassment or delay. *FDIC v. Schuchmann*, 319 F.3d 1247, 1250, 1252 (10th Cir. 2003) (internal quotation marks omitted).

Cases awarding attorney fees under the common-law bad faith exception are, like the cases under section 78B-5-825 and Utah Rule of Civil Procedure 11, usually characterized by extreme facts. For example, the U.S. Court of Appeals for the Tenth Circuit affirmed an attorney fee award against the United States government after the government entered into a settlement agreement with a farmer, unilaterally repudiated the contract without any justification, and then sued to foreclose on the farmer's

property. *United States v. McCall*, 235 F.3d 1211, 1217 (10th Cir. 2000). And the U.S. Supreme Court affirmed an attorney fee award under the common-law bad-faith exception where a party had, among other things, committed fraud on the court and made false and frivolous filings. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 41, 50-51 (1991).

These federal cases, interpreting a bad faith standard that includes both an objective and subjective component, should be considered by the Board in interpreting Rule B-15's objective bad-faith requirement. As these cases reflect, objective bad faith cannot be proven without clear evidence that an action was, objectively, frivolous.

D. Interpreting Rule B-15's objective bad-faith prong to require clear evidence of objective frivolousness is consistent with the Utah Coal Program's and Rule B-15's purpose to encourage public participation

The rationale for imposing attorney fees, under a bad faith rule, "is, of course, punitive." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). But punishing citizens who participate before the Board, and have a non-frivolous basis to do so, would fundamentally deter such citizen participation. That, in turn, would contravene both an express purpose of Utah's coal program and the reasons why Rule B-15, and the analogous federal rule on which it was modeled, were adopted.

One of the Utah Coal Mining and Reclamation Act's express purposes is assuring "public participation in the development, revision, and enforcement of rules, standards, reclamation plans, or programs established by the state." Utah Code Ann. § 40-10-2(4). As the Board has ruled, Rule B-15's bad-faith standard furthers this statutory purpose.

See Order on Recons. of Ruling Concerning Legal Standard Governing Fee Pets. 10 (Sept. 16, 2013). Citizens affected by coal mining operations may present novel challenges or raise issues that this Board has not previously addressed, and cannot know how the Board will resolve particular issues. If these citizens must fear being held liable for a permittee's attorney fees, even where the citizens have a non-frivolous basis for participating before the Board, even fewer citizens will participate.

An approach that subjected citizens to potential attorney-fee liability (or, for that matter, even disruptive discovery into their subjective intentions) when the citizens have a non-frivolous reason to challenge a permit would also be inconsistent with the purpose of Rule B-15. That Rule "adopted the federal rules' provision for payment of attorneys' fees," Suppl. Order Concerning Renewed Mot. for Leave to Conduct Disc. 3 (Nov. 3, 2014), in part to ensure consistency with the Department of the Interior's attorney-fee standards and as a prerequisite to approval of the Utah coal program. *See* Order on Recons. of Ruling Concerning Legal Standard Governing Fee Pets. 5 n.4 (Sept. 16, 2013). The Department of the Interior's attorney fee rule, which is worded identically to Rule B-15, *see* 43 C.F.R. § 4.1294(d), in turn implements the federal Surface Mining Control and Reclamation Act's statutory attorney-fee provisions, codified at 30 U.S.C. §§ 1275(e) and 1270(d). And the legislative history of that statute reflects Congress's intention "to encourage public participation in the administrative process" by setting an exceptionally high bar for imposition of attorney fees against a citizen. *See*

Special Rules Applicable to Surface Coal Mining Hearings and Appeals, 43 Fed. Reg. 15,441, 15,444 (Apr. 13, 1978); H.R. Rep. 95-218, at 131 (1977).

Congress, in adopting the Surface Mining Control and Reclamation Act's fee provisions, cited approvingly to a series of federal appellate cases that had interpreted fee-shifting provisions in other statutes. H.R. Rep. 95-218, at 90 (1977). About a year after the Surface Mining Control and Reclamation Act was adopted, the U.S. Supreme Court cited the same federal appellate cases to hold that a prevailing defendant may recover attorney fees under Title VII of the Civil Rights Act only if the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Under *Christianburg*'s frivolousness standard, "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation." *Hughes v. Rowe*, 449 U.S. 5, 15-16 (1980). Analyzing the merits of a claim after the fact, through "hindsight logic," has the potential to "discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christianburg*, 434 U.S. at 421-22. "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* Thus, *Christianburg*'s frivolousness standard does not focus on "whether the claim was ultimately successful." *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (8th Cir. 1985) (citing cases).

The Board in this case has cited the *Christianburg* standard to support its conclusion that Rule B-15 requires a showing of objective bad faith, in addition to a subjective intent to harass or embarrass. Suppl. Order Concerning Renewed Mot. for Leave to Conduct Disc. 4 (Nov. 3, 2014). And *Christianburg* interpreted a fee provision that, like Rule B-15, is intended to encourage robust citizen participation in public enforcement of the law. *See Christianburg*, 434 U.S. at 422; H.R. Rep. 95-218, at 90, 131 (1977); 43 Fed. Reg. 34,386 (Aug. 3, 1978) (quoting S. Rep. No. 95-128, at 59 (1977)). Particularly given these related purposes, conduct that does not violate *Christianburg*'s objective standard should not be held to violate Rule B-15's objective bad-faith prong.

II. Rule B-15 does not allow a permittee to recover attorney fees from a person who challenged a permit and had any objective good-faith basis for doing so

Rule B-15, like other litigation rules, should be interpreted according to its plain language and in light of cases interpreting similar rules. *Arbogast Family Trust v. River Crossings*, 238 P.3d. 1035, 1037-38 (Utah 2010). Rule B-15 states, in relevant part, that a permittee may recover attorney fees against a permit challenger only if the permittee demonstrates that the permit challenger "initiated a *proceeding* under section 40-10-22 of the Act or participated in such a *proceeding* in bad faith for the purpose of harassing or embarrassing the permittee." Rule B-15 (emphasis added), *quoted in* Decision & Order on the Legal Standard Governing Fee Pets. 4 (Mar. 27, 2013). Under the plain language of this rule, a party does not initiate or participate in a permit proceeding in objective bad faith if the party had any objective good-faith basis to challenge the permit. That is

true whether or not the Board determines that every specific contention or motion the person made was colorable. In other words, while Petitioners firmly believe that *none* of the contentions or motion that they made were frivolous, the Board does not need to reach that issue, if it finds that Petitioners had *some* good faith basis to challenge the permit. Assuming the Board makes that finding, Alton's fee petition should be denied.

Rule B-15's requirement that a permittee seeking fees prove that the opposing party brought the "proceeding" in objective bad faith stands in marked contrast to the language of some other attorney-fee provisions. For example, in contrast to Rule B-15, Utah Rule of Civil Procedure 11 permits attorney fees to be imposed on a party that presents a "motion" or "other paper" that contains a "claim" or "legal contention" that is frivolous. Utah R. Civ. P. 11(b). Thus, Rule 11 does not require the entire "proceeding" to have been in bad faith, but allows attorney fees to be awarded as a sanction where any particular filing is frivolous. Rule B-15 is different. It does not allow fees to be awarded to a permittee against a person who initiated or participated in a *proceeding* in objective or subjective good faith—even if, during the proceeding, the person presented some legal contention that was, in retrospect, not colorable.

The Utah Court of Appeals reached a similar conclusion in *Dahl v. Harrison*, 265 P.3d 139 (Utah App. 2011). That case addressed whether attorney fees could be recovered under Utah Code Ann. § 78B-5-825(1) for defending against a frivolous motion. Section 78B-5-825(1) allows recovery of attorney fees only if the "action" (rather

than "motion" or "contention") was both without merit and brought in subjective bad faith. Utah Code Ann. § 78B-5-825(1). As the court noted, the word "action" "basically mean[s] a lawsuit." *Dahl*, 265 P.3d at 150. The court thus held that section 78B-5-825 does not allow recovery of attorney fees every time a motion, which is not an entire lawsuit, is found to be without merit and in subjective bad faith. *Id.* at 149-50. A similar analysis applies to Rule B-15: fees may only be awarded to a permittee against a person who "initiated a *proceeding* . . . or participated in such a *proceeding*" in objective and subjective bad faith. A proceeding is not a motion; it is not a claim; and it is not a contention. Thus, under Rule B-15's plain language, proof that some particular motion, claim, or contention was frivolous does not entitle a permittee to fees. If the person against whom fees are sought had any objective good-faith basis for challenging the permit, the permittee may not recover attorney fees.

This reading of Rule B-15 is reinforced by the rule's separate requirement that a permittee prove that the proceeding was brought for "*the* purpose" of harassing or embarrassing the permittee. Rule B-15 (emphasis added). While the phrase "the purpose" concerns the Rule's subjective bad-faith requirement, it indicates the Rule's narrow compass. The definite article "the" is limiting: the *sole* purpose for the person's litigation must have been to harass or embarrass the permittee. A similar conclusion was reached in *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003), where the U.S. Court of Appeals for the Tenth Circuit held that a statute's use of the phrases "the

removal action" and "the remedial action" "indicates there will be but one 'removal action' . . . , as well as a single 'remedial action.'" *See also Black's Law Dictionary* 1477 (6th ed. 1990) ("In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force [of] 'a' or 'an.'"). Under Rule B-15, "*the* purpose" of the permit challenge—not *a* purpose—must have been to harass or embarrass the permittee for fees to be awarded.[6]

Rule B-15 thus requires the permittee to prove that the proceeding was *entirely* in bad faith, and does not allow the permittee to recover attorney fees against a party who had an objective good faith basis for challenging the permit. This Board should therefore deny Alton's fee claim unless Alton can demonstrate that Petitioners had *no* non-frivolous basis for challenging Alton's permit. That issue should be addressed first through further briefing; it does not require discovery. Unless Alton can make such a showing, any further proceedings—including a contention-by-contention probing of Petitioners' case, or discovery into Petitioners' subjective purposes—would waste the Board's and the parties' resources and unduly prolong these proceedings.[7]

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[6] Thus, if Petitioners had any subjective good-faith purpose, such as one consistent with the Utah coal program's goal of "assur[ing] that surface coal mining operations are conducted so as to protect the environment," Utah Code Ann. 40-10-2(3)—any additional purpose would be legally irrelevant.

[7] Alternatively, if the Board were to hold that Alton can satisfy the objective bad-faith component of Rule B-15 by proving that a *part* of Petitioners' case was frivolous, then the Board should require Alton to specify and prove which specific contentions it alleges violate that standard. Even under Rule 11, where sanctions may be awarded if a particular motion or contention was frivolous, fees can be awarded only to the extent

CONCLUSION

Rule B-15's objective prong requires a permittee to prove that the person from whom the permittee seeks fees initiated or participated in the proceeding with no non-frivolous basis for doing so. The Board should therefore proceed by requiring Alton to try to prove, through separate briefing and based on the existing record, that Petitioners had no non-frivolous basis for their challenge to the Coal Hollow mine permit. The Board should deny Alton's fee application altogether assuming Alton cannot make that showing.

January 12, 2015

Respectfully submitted,

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incurred "as a direct result of the violation." Utah R. Civ. P. 11(c)(2). *See Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 939 (Utah 1998) (affirming district court's refusal to award attorney fees for work not necessary to defend against the sanctionable claim). Alton cannot recover fees for defending against colorable contentions, and unless and until it proves specific claims of objective bad faith, the potential scope of its fee claim—and the appropriate scope (if any) of discovery into subjective purpose—cannot be evaluated.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2015, I served a true and correct copy of **BRIEF OF UTAH CHAPTER OF THE SIERRA CLUB ET AL., ON (1) THE MEANING OF RULE B-15'S OBJECTIVE BAD FAITH ELEMENT; AND (2) APPLICATION OF RULE B-15 IF THE BOARD FINDS THAT PETITIONER HAD AT LEAST SOME OBJECTIVE GOOD FAITH BASIS FOR CHALLENGING THE PERMIT** to each of the persons listed below via e-mail transmission.

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